COURT OF APPEAL FOR ONTARIO

CITATION: Forsythe v. Westfall, 2015 ONCA 810
DATE: 20151124
DOCKET: C60047

Gillese, Blair, MacFarland, Pepall and Benotto JJ.A.

BETWEEN

Rennie Forsythe

Plaintiff

(Appellant)

and

Michael Westfall, John Doe, Jevco Insurance Company and Intact Insurance Company

Defendants

(Respondents)

Alan L. Rachlin, for the appellant

Tracy L. Brooks and Victor Galleguillos, for the respondent Michael Westfall

Jason P. Mangano, for the respondent Intact Insurance Company

Brian M. Cameron, for the intervener Ontario Trial Lawyers Association

Heard: September 9, 2015

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated February 2, 2015, with reasons reported at 2015 ONSC 758.

MacFarland J.A.:

[1] This is an appeal from the order of Perell J. dated February 2, 2015 permanently staying the within action against the respondent Michael Westfall.

OVERVIEW

[2] The appellant, Rennie Forsythe, was a passenger on a motorcycle owned and operated by Westfall, an Alberta resident, when that vehicle was involved in a single vehicle accident in British Columbia on August 11, 2012. Westfall claims the accident was caused solely by an unidentified driver.

[3] The appellant was injured in the accident. She is an Ontario resident. She was treated for her injuries initially in British Columbia and Alberta and thereafter in her home province, Ontario.

[4] The appellant seeks damages for her injuries and commenced the within action against Westfall, his insurer Jevco Insurance Company, her own insurer AXA Insurance (Canada) ("AXA"),[1] and John Doe, representing the unidentified driver.

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[1] The appellant originally commenced proceedings against Intact Insurance Company ("Intact Insurance") rather than AXA. She obtained an order substituting AXA for Intact Insurance in the statement of claim after the motion that is the subject of this appeal was brought. The title of proceedings used in this judgment matches that of the order under appeal, which did not incorporate the amendment. Neither Intact Insurance nor AXA took a position on this appeal, though Intact Insurance appeared to correct the record as it appeared in the motion judge's reasons. Intact Financial Corporation is the parent company of Intact Insurance, Jevco Insurance Company, and AXA. At some point in mid-2011 Intact Financial Corporation acquired AXA and the obligations of AXA were then assumed by Intact Insurance. I refer to the appellant's insurer as AXA throughout this judgment.

[5] Westfall moved to have the action against him stayed on the basis that the Ontario court lacked jurisdiction over him. The motion judge agreed with Westfall's position on the basis that there was not a real and substantial connection between the matter, the parties, and Ontario. He followed this court's decision in *Tamminga v. Tamminga*, 2014 ONCA 478, 120 O.R. (3d) 671, and held that the appellant's Ontario automobile insurance policy was not a factor that satisfied the real and substantial connection test.

[6] Forsythe appealed that decision to this court. Her argument at its heart is that this court's decision in *Tamminga* was wrongly decided and should be overturned. For this reason, the appeal was heard by a five-judge panel. At the conclusion of the appellant's and the intervener's oral arguments, the court advised counsel that it did not need to hear from Westfall and that the appeal was dismissed for reasons that would follow. These are those reasons.

FACTS

The accident

[7] On August 11, 2012, Westfall was driving his motorcycle near the City of Vernon, British Columbia. The appellant was a passenger. They were on a road trip to visit hot springs in the province. Westfall lost control of his motorcycle and there was an accident.

[8] Both Westfall and the appellant were injured in the accident. She suffered a severe concussion and brain injury, as well as injuries to her back, head, left shoulder, left elbow and left bicep.

[9] In the within action, the appellant seeks damages for these injuries. In her statement of claim, she pleads that the accident was caused solely by an unidentified driver, John Doe, or that in the alternative, the accident was caused or contributed to by the negligence of Westfall.

[10] Westfall says that an unidentified vehicle crossed into his lane of traffic and caused the accident. There was no contact between the vehicles, but Westfall lost control of his motorcycle and the accident ensued. Westfall does not admit his negligence. He blames the unidentified driver.

The insurance policies

[11] At the time of the accident the appellant was insured under a standard automobile policy issued to her by AXA Ontario. Section 5 of that policy sets out the appellant's uninsured and unidentified automobile accident benefits coverage, including provisions respecting settlement of a claim thereunder. Section 5.6.3 provides that:

> The matter may be decided in a lawsuit brought against us by you or other insured persons in an Ontario Court. If so, we have the right to ask the court to decide who is legally responsible and the amount of compensation owing, unless another Ontario court has already done so in an action that was defended.

[12] The "easy to read" language of this provision reflects s. 4(1) of *Uninsured Automobile Coverage*, R.R.O. 1990, Reg. 676 ("Regulation 676"), made under the *Insurance Act*, R.S.O. 1990, c. I.8, which states:

> The determination as to whether the person insured under the contract is legally entitled to recover damages and, if so entitled, the amount thereof shall be determined,
>
> ...
>
> (c) by a court of competent jurisdiction in Ontario in an action brought against the insurer by the person insured under the contract, and unless the determination has been previously made in a contested action by a court of competent jurisdiction in Ontario, the insurer may include in its defence the determination of liability and the amount thereof.

[13] Westfall was insured under a standard automobile policy issued by Jevco Insurance Company in Alberta. For the purpose of accident benefits coverage that policy defines an "unidentified automobile" as:

> an automobile which causes bodily injury or death to an insured person arising out of physical contact of such automobile with the automobile of which the insured person is an occupant at the time of the accident, provided
>
> (a) the identity of either the owner or driver of such automobile cannot be ascertained … . [Emphasis added.]

[14] In other words, for Westfall's policy to provide coverage when an unidentified automobile is involved in an accident with his motorcycle, there must be contact between the two vehicles. There was no contact between Westfall's motorcycle and the unidentified automobile.

THE DECISION BELOW

[15] The motion judge outlined the appellant's and Westfall's insurance policies and noted the significance of the fact that no collision occurred in the accident. He explained that depending on whether Westfall is found culpable to any degree the appellant may or may not have a claim under her uninsured automobile coverage.

[16] For example, if Westfall is found blameless then he may be an uninsured driver for the purposes of the appellant's insurance policy. This is because Westfall's policy does not provide unidentified automobile coverage in the absence of "physical contact" between the unidentified automobile and Westfall's motorcycle. Conversely, if Westfall is found culpable to any degree, then he is an insured driver and there would be no need for the appellant to claim under her uninsured motorist coverage, though she might need underinsured coverage if Westfall's liability limits were insufficient to compensate her for her injuries.

[17] The motion judge noted the further complication that section 5.6.3 of the appellant's insurance policy requires that she sue in Ontario to determine whether she has coverage or not. Thus, in order to protect her claim from being statute-barred, the appellant commenced the within action and a second action in British Columbia against Westfall.

[18] With these background facts in mind, the appellant argued that the Ontario court had jurisdiction *simpliciter* over her claim against Westfall or that it should assume jurisdiction under the forum of necessity doctrine.

[19] The motion judge followed this court's decision in *Tamminga* and held that the appellant's Ontario automobile insurance policy was not a factor that satisfied the real and substantial connection test set out by the Supreme Court in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572. He refused to distinguish *Tamminga* on the basis that the claim in that case was speculative or contingent because, in his opinion, the appellant's claim under her automobile insurance policy also remains speculative and contingent.

[20] In respect of the forum of necessity doctrine, the motion judge explained that this narrow exception to the real and substantial connection test required the appellant to establish there was no other forum in which she could reasonably obtain access to justice. He concluded the test was not met, for reasons with which I fully agree and adopt later in this judgment.

ISSUES

[21] This appeal raises the following issues:

1) Is the appellant's insurance contract a presumptive connecting factor that gives this court jurisdiction over the entire dispute, including her claim against Westfall? Should this court overrule or distinguish its decision *Tamminga*?

2) Should this court recognize a new presumptive connecting factor on the facts of this case?

3) Did the motion judge err by failing to extend the forum of necessity doctrine to the circumstances of this case?

ANALYSIS

Is the appellant's insurance contract a presumptive connecting factor that gives this court jurisdiction over the entire dispute? Should this court overrule or distinguish *Tamminga*?

[22] In a nutshell the appellant's argument is that because s. 4(1)(c) of Regulation 676 and her automobile insurance policy, issued to her in Ontario, require that an Ontario court determine issues of liability and damages, her policy is a presumptive connecting factor that satisfies the real and substantial connection test set out in *Van Breda* and gives this court jurisdiction over the entire dispute, including her claim against Westfall.

[23] Lebel J., writing for the court, set out four presumptive connecting factors in *Van Breda*, at para. 90:

> [I]n a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:
>
> (a) the defendant is domiciled or resident in the province;
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> (b) the defendant carries on business in the province;
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> (c) the tort was committed in the province; and
>
> (d) a contract connected with the dispute was made in the province.

[24] The appellant argues that her automobile insurance policy is a "contract connected with the dispute" and gives Ontario courts jurisdiction over part of the dispute because it requires her to sue her own insurer in Ontario. Moreover, Regulation 676 compels her to sue her insurer in Ontario. She then relies upon *Van Breda*, at para. 99, for the proposition that this court should assume jurisdiction over all aspects of her claim. At para. 99 of *Van Breda*, Lebel J. stated:

> I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The

> plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.

[25] I do not accept this submission. The appellant sues Westfall in tort and in tort only. Absent the motorcycle collision she would have no claim against any of the named respondents including her own insurer. Her potential claim against her insurer arises as the result of a private contract between the appellant and her insurer AXA. Westfall is not a party to that contract, he is not a named insured under the provisions of that contract – in short, it has nothing to do with him.

[26] This same issue was squarely before this court in *Tamminga*, where Strathy C.J.O. outlined the issues, at para. 1, as follows:

> An Ontario resident was injured when she fell off a truck in Alberta. She commenced an action in the Ontario Superior Court of Justice against the owner and operator of the truck, who lives in Alberta, and a corporate co-owner of the truck, which is registered and carries on business in Alberta. She also sued her Ontario automobile insurer. The issue is whether her insurance contract is a sufficient "presumptive connecting factor" under [*Van Breda*] to give this court jurisdiction over the non-resident defendants. For the reasons that follow, I conclude that it is not and would dismiss this appeal … .

[27] Strathy C.J.O went on to explain, at paras. 25-26, that:

> An automobile insurance contract "anticipates" accidents generally, but the tortfeasor will not be identifiable in advance. Unlike the contract in *Van Breda*, there is nothing that connects the appellant's insurance contract to the respondents. They are not

> parties to or beneficiaries of the contract. The appellant was not visiting the farm in Alberta for any reason related to the contract. The connection between the insurance policy and the dispute only arises in the aftermath of the tort and its application is conditional on the outcome of the appellant's claim against the tortfeasors.
>
> In a word, there is no nexus between the insurance contract and the respondents.

[28] These words are apt and apply directly to the facts of this case.

[29] The appellant submits, however, that three factors distinguish her claim from *Tamminga* and prior related cases which have come to the same conclusion.

[30] First, she says her claims against AXA are not contingent on the outcome of any litigation against Westfall. On this basis she submits that Strathy C.J.O.'s statement in *Tamminga*, at paras. 25-26, is inconsistent with prior cases in which this court has held that a plaintiff has a direct right of action against his or her insurer under uninsured automobile coverage.

[31] The law is clear that the appellant has a direct claim against her own insurer and is entitled to pursue that claim, if she wishes, independently of her claim against Westfall: *Somersall v. Friedman*, 2002 SCC 59, [2002] 3 S.C.R. 109; *Johnson v. Wunderlich* (1986), 57 O.R. (2d) 600, 1986 CanLII 2618 (C.A.). This court's decisions in *Tamminga* and earlier cases such as *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68, 2002 CanLII 44959 (C.A.) do not hold otherwise. In *Tamminga*, Strathy C.J.O expressly noted, at para. 6, that the motion judge's

decision, which this court upheld on appeal, was based in part on the fact that the plaintiff had a direct right of action against her insurer without having to join the extra-provincial defendants.

[32] *Tamminga* stands for the proposition that a contract between a plaintiff and her insurer is not a presumptive connecting factor that would give an Ontario court jurisdiction over a claim against an extra-provincial defendant. Strathy C.J.O., at para. 27, noted that this conclusion was consistent with Sharpe J.A.'s conclusion in *Gajraj*, at para. 20, that "[j]urisdiction over claims against extra-provincial defendants should not be bootstrapped by such a secondary and contingent claim against a provincial defendant." These cases do not interfere with the appellant's right to pursue a claim against her insurer in Ontario.

[33] Furthermore, there was no error in the motion judge's finding that the appellant's claim against her insurer is speculative or contingent. For example, if a British Columbia court finds Westfall culpable to any degree, then the appellant may recover all her damages against him and no longer needs to proceed with the claim against AXA. The claim in *Tamminga* was similarly speculative because the extra-provincial defendants had not provided any information concerning their insurance coverage. It was therefore uncertain whether the plaintiff's Ontario insurer would be required to provide uninsured or underinsured coverage.

[34] Second, the appellant submits that *Tamminga* is distinguishable because her claim involves an unidentified driver as opposed to an uninsured or underinsured driver.

[35] I see no principled basis upon which to distinguish among underinsured, uninsured and unidentified drivers. The principles set out in *Tamminga* are equally applicable to all three types of coverage under a plaintiff's Ontario insurance policy. Indeed, the appellant's insurance policy deals with both uninsured and unidentified coverage in the same way and makes no distinction between the two.

[36] Section 5 of the appellant's insurance policy deals with unidentified coverage under the title "Uninsured Automobile Coverage". Section 5.1.3 of the policy defines "unidentified automobile" as one "whose owner or driver cannot be determined." Section 5.2.1 of the policy, respecting claims by the appellant or other insured persons for bodily injury, states:

> We will pay any amounts you or other insured persons have a legal right to recover as damages from the owner or driver of an uninsured or unidentified automobile for bodily injury resulting from an accident involving an automobile, up to the limits in this Section. [Emphasis added.]

[37] I see no reason to distinguish *Tamminga* on this basis.

[38] Third, the appellant submits that this court in *Tamminga* did not consider s. 4(1)(c) of Regulation 676, which requires that she litigate her claim against AXA in Ontario, and that if it had, the result in that case would have been different.

[39] In Ontario, motor vehicle policies of insurance are highly regulated pursuant to various provisions of the *Insurance Act*. For example, s. 227 of the Act provides that the Superintendent of Financial Services must approve the form of certain documents, including automobile insurance policies, endorsements or renewals. Under s. 227(5) the Superintendent may also approve the form of standard policies in conformity with the automobile insurance provisions in Part IV of the Act.

[40] Moreover, statutory conditions which are prescribed by regulation are deemed to form a part of every policy of automobile insurance: s. 234(1). Section 4(1)(c) of Regulation 676 is no different from any other provision that is required to be part of an automobile insurance contract in Ontario.

[41] The fact remains, however, that whatever the terms of the contract are between the appellant and her insurer, the contract has nothing to do with Westfall nor with the accident. Westfall is not a party to the contract. The contract did not cause or increase the likelihood of the accident. The specific accident was never contemplated by the parties when the contract was entered into.

[42] Whether the contractual term that mirrors s. 4(1)(c) of Regulation 676 is prescribed by statute or not, it remains a term of the contract between the appellant and her insurer and it has nothing to do with Westfall – over whom the appellant seeks to establish jurisdiction. The fact that a contractual term is prescribed by statute makes no difference.

[43] This very point was considered by this court in *Gajraj*, at para. 19. Sharpe J.A. summarized the plaintiff's argument, with explicit reference to Regulation 676, as follows:

> Pursuant to s. 4 of Regulation 676 – Uninsured Automobile Coverage, R.R.O. 1990, liability and damages are to be determined by agreement of the parties, by arbitration, or by "a court of competent jurisdiction in Ontario". The plaintiffs submit that since the action against Allstate must proceed in Ontario, jurisdiction should be assumed against the New York defendants to avoid a multiplicity of proceedings.

[44] This is the very argument advanced here.

[45] In *Gajraj*, at para. 20, Sharpe J.A. concluded that:

> the core of the claim is against the New York defendants and the claim against the Ontario defendant is entirely secondary and contingent. Jurisdiction over claims against extra-provincial defendants should not be bootstrapped by such a secondary and contingent claim against a provincial defendant.

[46] Furthermore, acceding to the appellant's argument by giving presumptive effect to an insurance contract that mirrors a legislative jurisdictional requirement would expand the jurisdiction of Ontario courts beyond the boundaries contemplated by *Van Breda*.

[47] Accordingly I do not accept the appellant's submission. This court in *Tamminga*, at para. 27, stated its decision was consistent with Sharpe J.A.'s conclusion in *Gajraj*. Strathy C.J.O quoted the above paragraph in full. In both cases this court was aware that the plaintiffs were required to litigate claims against their insurers in Ontario.

Should this court recognize a new presumptive connecting factor?

[48] The intervener and appellant argue that if the appellant cannot meet any of the four presumptive connecting factors set out in *Van Breda*, this court should recognize a new presumptive connecting factor. They say this factor should be based on the appellant's insurance contract, the regulatory requirement, the fact that she resides in Ontario, that she sustained damages in Ontario, and that she is required to bring suit in two jurisdictions, which may give rise to inconsistent verdicts. They submit that recognizing a new presumptive connecting factor in the circumstances would be consistent with the values of order, fairness, efficiency, and comity.

[49] In my view these are not factors that go to jurisdiction *simpliciter*. They may well be appropriate in a *forum non conveniens* argument but they do not establish jurisdiction.

[50] As Lebel J. noted in *Van Breda*:

> [82] Jurisdiction must — irrespective of the question of forum of necessity, which I will not discuss here — be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. … Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts.
>
> …
>
> [89] The use of damage sustained as a connecting factor may raise difficult issues. ... The problem with accepting unreservedly that if damage is sustained at a particular place, the claim presumptively falls within the jurisdiction of the courts of the place, is that this risks sweeping into that jurisdiction claims that have only a limited relationship with the forum. An injury may happen in one place, but the pain and inconvenience resulting from it might be felt in another country and later in a third one. As a result, presumptive effect cannot be accorded to this connecting factor.

[51] There is no basis on which the facts of this case could establish a new presumptive connecting factor. And the court must be cautious not to confuse jurisdiction *simpliciter* and the doctrine of *forum non conveniens*. They are distinct concepts. As Lebel J. noted in *Van Breda*, at para. 101, "*[f]orum non*

conveniens comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself."

Is Ontario the forum of necessity?

[52] Finally, the appellant argues that an Ontario court should assume jurisdiction on the basis of the forum of necessity doctrine. She says that Ontario should assume jurisdiction to avoid a multiplicity of proceedings and the potential for inconsistent judgments in Ontario and British Columbia. In her view, the only practical approach is for one court to hear all matters relating to liability and damages.

[53] I do not accept this submission. The forum of necessity doctrine is available in extraordinary and exceptional circumstances. For Ontario to accept jurisdiction as the "forum of necessity" the appellant must establish that there is no other forum in which she can reasonably seek relief: *West Van Inc. v. Daisley*, 2014 ONCA 232, 119 O.R. (3d) 481, at para. 20, leave to appeal refused, [2014] S.C.C.A. No. 236.

[54] The appellant has failed to establish that she cannot reasonably seek relief elsewhere. She can, and has, pursued a claim against Westfall in British Columbia. She may also continue her claim against AXA in Ontario.

[55] In respect of this submission, I agree with and adopt the motion judge's reasons, at paras. 27-29:

I see no room for the operation of the forum of necessity doctrine. This doctrine is an exception to the real and substantial connection test that recognizes that there will be extraordinarily and exceptional cases where the need to ensure access to justice will justify the domestic court's assumption of jurisdiction: *West Van Inc. v. Daisley*, 2014 ONCA 232 (CanLII) at paras. 17-38; *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84 (CanLII), [2010] O.J. No. 402 (Ont. C.A.) at para. 100, affd. S.C.C. (*sub nom. Club Resorts Ltd. v. Van Breda*), *supra*.

The exception is very narrow, and the plaintiff must establish that there is no other forum in which he or she reasonably could obtain access to justice: *Bouzari v. Bahremani*, [2011] O.J. No. 5009 (S.C.J.). Typically, the doctrine is unavailable because of its high bar, and its availability has been rejected in numerous cases: *West Van Inc. v. Daisley, supra*; *Van Kessel v. Orsulak*, 2010 ONSC 619; *Elfarnawani v. International Olympic Committee*, 2011 ONSC 6784 (CanLII); *Mitchell v. Jeckovich*, *supra*. The doctrine is reserved for exceptional cases such as where there has been a breakdown in diplomatic or commercial relations with the foreign state or where the plaintiff would be exposed to a risk of serious physical harm if the matter was litigated in the foreign court.

There is no chance in the immediate case that Ms. Forsythe will be denied access to justice. She remains free to sue in Ontario to enforce her claim against Intact after, or even before, she obtains access to justice for her claim against Mr. Westfall in British Columbia. It may be inconvenient that she is denied one-stop access to justice, but there is no room here for the forum of necessity doctrine.

DISPOSITION AND COSTS

[56] Accordingly, I would dismiss the appeal, and, as agreed by counsel, would order no costs of this appeal to any party.

Released: November 24, 2015 "EEG"

"I agree E.E. Gillese J.A."
"J. MacFarland J.A."
"I agree R.A. Blair J.A."
"I agree S.E. Pepall J.A."
"I agree M.L. Benotto J.A."